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No. 134

In the Supreme Court of the United States

OCTOBER TERM, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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No. —

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, PETITIONER

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of Clark Squire, Collector of Internal Revenue for the District of Washington, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on March 11, 1955.

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 38–44) are not reported. Its opinion dated August 27, 1952 (App. 8a–13a), is reported at 110 F. Supp. 924. The opinion of the Court of Appeals (App. 13a–15a) is reported at 220 F. 2d 349.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1955 (App. 15a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED

Whether income from the sale of timber from allotted, restricted land held in trust by the United States for restricted Quinaielt Indians is exempt from federal income tax.

STATUTES AND TREATY INVOLVED

The pertinent provisions of the statutes and treaty involved are set forth in Appendix A.

STATEMENT

Taxpayers are husband and wife, full-blood Quinaielt Indians, born on the Quinaielt Indian Reservation and duly enrolled and recognized members of the Quinaielt Indian Tribe. They are citizens of the United States and residents of the State of Washington, and are under the jurisdiction, supervision, and control of the United States acting through the Superintendent of the Taholah Indian Agency. They are classified as noncompetent Indians and wards of the United States Government. (R. 33.)

On July 1, 1855, and January 25, 1856, a treaty was concluded between the United States of America and the Quinaielt and allied bands of Indians, whereby the members of the Indian

tribes ceded to the United States their interest in certain lands within the territory of Washington then occupied by them (12 Stat. 971). Under the terms of that treaty, there was secured to members of the Quinaielt Indians a reservation of lands sufficient for their wants, which reservation was later designated by the United States and thereafter surveyed and set apart for their exclusive use. The Indian reservation so set aside has since been the home of the Quinaielt Indians, including taxpayers. (R. 34–35.)

Under authority of the Quinaielt treaty of July 1, 1855 (12 Stat. 971), the General Allotment Act of February 8, 1887 (c. 119, 24 Stat. 388), and supplementary or amendatory acts of Congress, the taxpayer husband was allotted 93.25 acres of real property within the Quinaielt Indian Reservation and a trust patent was issued to him on October 1, 1907. This land and the standing timber thereon, consisting of coniferous-bearing trees, is trust property under the joint supervision and control of the United States and of the taxpayer husband, and neither the land nor the timber growing thereon is subject to alienation by the allottee without consent and approval of the United States. The fee title to this land is held by the United States in trust for the allottee. (R. 35–36.)

During the year 1943 certain standing timber on taxpayers' allotted land was sold under a con-

tract entered into by the Bureau of Indian Affairs of the Department of the Interior with the approval of taxpayers, which contract of sale provided that payment for the timber should be made after it was cut and sold. A total of $15,080.80 was realized from this sale, $8,418.28 of which was received on behalf of taxpayers during 1943. The amount of $1,537 was paid over to taxpayers during 1943 and the balance of the 1943 receipts, or $6,878 (with an unaccounted expenditure of $3.28), was placed in trust by the United States and maintained in an account for the benefit of taxpayers, subject to withdrawal by or with the consent of the appropriate officials of the Department of the Interior. (R. 36.)

In 1947, taxpayers filed a joint income tax return for the year 1943, reporting taxable capital gain of $2,859.32 from the sale of the timber in that year, and on October 10, 1947, paid to the Collector the sum of $298.11 due thereon, plus $64.09 accrued interest (R. 15–18, 36–37). The timber had been acquired on October 1, 1907 (R. 13–15), and a total gain of $5,718.64 was reported, only 50% of which was treated as taxable as a long-term capital gain (R. 18). The gain of $5,718.64 reported was computed by deducting from the $8,418.28 received for the timber the amount of $2,026.80, as the March 1, 1913, fair market value, the timber having no actual cost basis and by deducting the amount of $673.46 as the expense of sale (costs of administration by

the Indian Agency) and the cost of improvements subsequent to March 1, 1913 (R. 18, 20).

The taxpayers filed a timely claim for refund of the taxes paid pursuant to this return (R. 20-27, 40). After denial of the claim, this refund suit was instituted on March 3, 1948 (R. 40).

On the basis of the foregoing facts, the District Court concluded, as far as here material, as follows:

That the United States holds the land allotted to the taxpayer husband in trust for him, that the moneys derived from the sale of timber are part and parcel of the trust estate, and that the United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty; that the sale of timber which is involved in this case is the sale of part of the realty, because timber, until severed, is a part of the land, and that the United States cannot tax a part or the whole of the lands for the reason that it would be in violation of its trust and the guarantee stated in the General Allotment Act of February 8, 1887; and that this tax exemption once granted by Congress is a vested property right which cannot be impaired by subsequent legislation (R. 41-43, App. 10a-12a). The District Court accordingly held that the taxpayers were entitled to recover (R. 45, App. 13a). The Court of Appeals affirmed the judgment of the District Court (App. 13a-15a).

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct, express conflict with the decision of the Court of Appeals for the Tenth Circuit in *Jones* v. *Taunah*, 186 F. 2d 445, certiorari denied, 341 U. S. 904. In the *Taunah* case, as here, the issue was whether income derived by restricted Indians from allotted, restricted lands held in trust by the United States was exempt from federal income tax. Although the taxpayers in the present case are members of a different Indian tribe and although the income here consists of proceeds from the sale of timber which has been severed from the land, while in the *Taunah* case the income consisted, for the most part, of royalties and bonuses realized from the sale of oil and gas severed or to be severed from the land, the cases are alike in that the exemption from tax, if one exists, must be based upon the provisions of the General Allotment Act of 1887 (App. 3a–6a) and the unique relationship of the Indian taxpayers to the United States. The square conflict of decisions was conceded by the court below: "* * * while the [District Court] appeared to regard as distinguishable the decision of the Tenth Circuit in the cognate case of *Jones* v. *Taunah*, 186 F. 2d 445, we see no ground upon which the holding can be

distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips" (App. 14a-15a).[1]

The decision below is also in conflict with the decision of the Tax Court in *Scott* v. *Commissioner*, 8 T. C. 126, which like the instant case involved the taxability of income paid on behalf of a Quinaielt Indian for timber cut from allotted, restricted land. Indeed, the instant taxpayers deferred the filing of the returns involved in this case pending the decision in the *Scott* case (R. 18-19).

2. We think the decision of the court below is erroneous and that the contrary decisions of the Tenth Circuit and of the Tax Court are correct. It is settled that Sections 11, 21, and 22 of the Internal Revenue Code of 1939 (App. 1a) subject to tax all the income of Indian citizens of the United States, like that of other citizens, unless an exemption from such taxation is definitely expressed in the taxing statute or in some act of Congress or agreement with the Indians dealing with their affairs. *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418; *Choteau* v. *Burnet*, 283 U. S. 691; *Oklahoma Tax Commission* v. *Texas Co.*, 336 U. S. 342, 353, fn. 21; *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598. There is no express exemp-

[1] The District Court cited *Jones* v. *Taunah* in a footnote among cases which it said, without analysis, were distinguishable from the instant case (App. 13a).

tion from tax in the Quinaielt treaty of 1855 (App. 2a–3a) the General Allotment Act of 1887 (App. 3a–6a), or in the trust patent for the allotted lands (R. 13–15). By adopting the reasoning of the District Court, the court below erroneously held that to tax income derived from the sale of timber from taxpayers' land would place a charge on the land, contrary to the undertaking by the United States, contained in the General Allotment Act of 1887 and repeated in the trust patent (R. 13–15), to convey the allotted land at the end of the trust period to the allottee in fee "discharged of said trust and free of all charge or incumbrance whatsoever". But as held by the Tenth Circuit and the Tax Court, this general language is insufficient to create an implied exemption from tax of *income* from such land, including income from the sale of oil and gas, or timber, respectively.

3. The issue presented by this case is one of continuing importance in the administration of the revenue laws. It is also, of course, of importance to the approximately 225,000 Indians who, like these taxpayers, hold restricted, allotted lands. The lands concerned total about 13,600,000 acres, and the income derived from these lands is substantial. We are informed by the Department of the Interior that during the fiscal year ended June 30, 1954, more than $10,500,000 was realized in the form of rents, royalties and bonuses from oil and gas leases from restricted,

allotted lands, and that during calendar year 1954 more than $1,800,000 was realized from the sale of timber cut from such property. Unless the question of the taxability of this income is resolved by this Court, Indians within the jurisdiction of the Tenth Circuit will be taxed on their income from such property while Indians within the jurisdiction of the Ninth Circuit will be held exempt from such tax.

CONCLUSION

There is a conflict of decisions on a matter of continuing importance which should be resolved by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

JUNE 1955.

APPENDIX A

Internal Revenue Code of 1939:

SEC. 11 [As amended by Sec. 102, Revenue Act of 1942, c. 619, 56 Stat. 798]. NORMAL TAX ON INDIVIDUALS.

There shall be levied, collected, and paid for each taxable year upon the net income of every individual a normal tax of 6 per centum of the amount of the net income in excess of the credits against net income provided in section 25. (For alternative tax, if gross income from certain sources is $3,000 or less, see section 400.)
(26 U.S.C. 1952 ed., Sec. 11.)

SEC. 21. NET INCOME.

(a) *Definition.*—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U.S.C. 1952 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or

gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(m) *Depletion.*—In the case of * * * timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

Treaty with the Qui-nai-elts, 12 Stat. 971:

Treaty between the United States and the Qui-nai-elt and Quil-leh-ute Indians. Concluded on the Qui-nai-elt River, in the Territory of Washington, July 1, 1855, and at the city of Olympia, January 25, 1856. Ratified by the Senate, March 8, 1859. Proclaimed by the President of the United States, April 11, 1859

* * * * *

Whereas, a treaty was made and concluded on the Qui-nai-elt River, in the Territory of Washington, on the first day of July, one thousand eight hundred and fifty-five, and at the city of Olympia also in said Territory, on the twenty-fifth day of January, one thousand eight hundred and fifty-six, between Isaac I. Stevens, governor and superintendent of Indian affairs in the Territory aforesaid, on the part of the United States, and the hereinafter-named chiefs, headmen, and delegates of the different tribes and bands of the Qui-nai-elt and

Quil-leh-ute Indians, on the part of said tribes and bands, and duly authorized thereto by them; which treaty is in the words and figures following, to wit:—

* * * * *

ARTICLE I. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: * * *

ARTICLE II. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use; and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. * * *

* * * * *

ARTICLE V. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the

sum of two thousand five hundred dollars * * *

* * * * *

General Allotment Act of February 8, 1887, 24 Stat. 388:

> CHAP. 119. An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.
>
> SEC. 1. [As amended by Sec. 17, Act of June 25, 1910, c. 431, 36 Stat. 855] That in all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part thereof may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * * (25 U. S. C. 1952 ed., Sec. 331.)

* * * * *

> SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust

for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: * * *

(25 U. S. C. 1952 ed., Sec. 348.)

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and ~~criminal,~~ of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted

the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.
(25 U. S. C. 1952 ed., Sec. 349.)

Act of May 8, 1906, c. 2348, 34 Stat. 182:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section six of an Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," be amended to read as follows:

"SEC. 6. * * * That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: * * *"

* * * *

(25 U. S. C. 1952 ed., Sec. 349.)

Act of June 25, 1910, c. 431, 36 Stat. 855:

* * * * *

SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

* * * * *

(25 U. S. C. 1952 ed., Sec. 406.)

Act of June 18, 1934, c. 576, 48 Stat. 984:

An Act To conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That * * *

SEC. 2. The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

* * * * *

(25 U. S. C. 1952 ed., Sec. 462.)

APPENDIX B

In the District Court of the United States for the Western District of Washington, Southern Division

No. 1101

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, PLAINTIFFS

v.

UNITED STATES OF AMERICA AND CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, DEFENDANTS

Filed September 3, 1952.

Opinion

August 27, 1952

JAMES ALGER FEE, *District Judge:*

Horton Capoeman and Emma Capoeman, his wife, both citizens of the United States, hereinafter referred to as "plaintiffs," are noncompetent Indian wards of the United States under the supervision and control of the Taholah Indian Agency. They are full-blood Quinaielt Indians, born and residing on the Quinaielt Reservation in the State of Washington.

Under the provisions of the Quinaielt Treaty with the United States, dated July 1, 1855, and January 25, 1856 (12 Stat. 971), Quinaielt Indian tribal lands were transferred to the United States, but there was reserved therefrom and set apart

for the exclusive use of the members of the Quinaielt tribe an area designated in accordance with the terms of the treaty. On October 1, 1907, pursuant to the terms of the treaty and the General Allotment Act of February 8, 1887 (24 Stat. 388), a trust patent was issued to Horton Capoeman for approximately ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is held by the United States in trust for Horton Capoeman, and said land was not and still is not subject to alienation nor encumbrance by plaintiffs except with the consent and approval of the proper agents of the United States.

During the year 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs of the United States Department of Interior providing for the cutting and sale of timber from plaintiffs' allotment, $8,418.28 worth of timber was cut, sold and paid for. Of the $8,418.28 received, $1,537.00 was distributed to plaintiffs, and the balance of $6,878.00 (with $3.28 unaccounted for) was placed in trust by the United States and maintained, subject to withdrawal solely by or for their use and benefit, in an account for the plaintiffs.

Plaintiffs filed a joint income tax return for the calendar year 1943, reporting long-term capital gain from the sale of the timber in that year. The return was filed on October 10, 1947, and on that date plaintiffs paid the taxes shown due.

On January 2, 1948, plaintiffs filed a claim for refund of the taxes paid, and contended that their income derived from the sale of timber from the allotted land was not subject to federal income

taxation because such taxation would be in violation of the provisions of the Quinaielt Treaty and of the trust patent. The claim for refund was denied by the Bureau of Internal Revenue on January 21, 1948, and this action was instituted on March 3, 1948.

The refund must be allowed.

The United States now has a sum of money in trust for these Indian wards. It is demonstrable that this amount is part and parcel of the corpus of a trust estate which the government has held ever since the treaties of 1855 and 1856.[1] Before that date, the Indians had rights of occupancy in a vast territory. These were ceded to the United States in return for protection and tutelage.[2] But there was expressly reserved the title to a tract of land.[3] The United States held the legal title thereof as trustee. When the allotment acts[4] were given effect, there was no change in this situation. The Indians simply relinquished their respective claims to a large area of communal lands, and each respectively accepted in lieu thereof equitable title to a definite parcel of land allotted in severalty.[5] At the end of the trust period, a conveyance was to be made to the Indian or his heirs of such parcel in fee "discharged of said trust and free of all charge or incumbrance whatsoever."[6] This is a simple restatement of the obligation of the trustee. As a result, the

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[1] 12 Stat. 971.

[2] Article I of the Treaty, 12 Stat. 971.

[3] Article II of the Treaty, 12 Stat. 971.

[4] 24 Stat. 388, as amended, 25 U. S. C. A. 331–57.

[5] 25 U. S. C. A. § 331.

[6] 25 U. S. C. A. § 348.

United States has no power to levy a duty or impost or charge upon the lands over which it has plenary power by virtue of ownership and sovereignty. The State of Washington can levy no tax on the whole or any part or parcel thereof.[7] After the conveyance, which must be authorized by the Indian in order to burden him with the weight of obligation, the national and state governments are empowered to tax this land and its increments as the real property of any other citizen.[8] It follows that, until the land is thus conveyed, it cannot be treated as "capital" or a "capital asset." For, by such classification, the United States would be violating not only a moral right of the Indian, but would be violating the statute by placing a "charge or incumbrance" on the land. The state cannot collect back taxes upon land before the date of conveyance in fee to the Indians. The federal government has no right upon a sale by the Indian, immediately after a patent to him in fee, to tax the difference in value between the date of the treaty, or even March 1, 1913, and the date of sale as a capital asset. By that process it could destroy the value of the trust property. Likewise, there could be no tax upon a sale by the United States of ten acres out of an hundred acre allotment with the consent of the allottee before the end of the trust period. The reason is that the government had the real property in trust before the sale of part

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[7] The tax exemption runs equally against state and federal governments. See *Landman* v. *United States*, 71 F. Supp. 640, 647; *Oklahoma Tax Commission* v. *United States*, 319 U. S. 598.

[8] 25 U. S. C. A. § 349.

thereof, and the price received is only a substitute charge. But here the sale was of part of the realty. Timber, until severed, is part of the land.[9] No distinction can be drawn between the operation and the sale of a parcel out of a larger area.[10]

During the long history of the Chancelors and in the equity courts, cutting of timber by one not the owner of the fee constituted waste, and the proceeds of timber cut by a trustee was a part of the trust estate. If the timber had remained standing upon the land until patent issued in fee, neither state nor national government could have taxed it because it was part of the trust property. Nor on sale of the severed timber after patent could the increment in value be based upon a date prior to the transfer of the land to the Indian.

This holding is not inconsistent with decisions that the proceeds of fructus industriales such as grasses cut from the land or the fruits of fisheries appurtenant can be taxed. There no portion of the corpus of the trust is taxed, but only the profit therefrom. It is more doubtful that the pro rata share of the individual Indian in the distribution of the yield of tribal communal lands can be taxed, but at least a basis for rationalization exists. In the instant situation, the trust is violated by an uncompensated diminution of the corpus.

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[9] *Northern Pacific Railroad* v. *Paine*, 119 U. S. 561, 564.

[10] This same reasoning was used in connection with oil and gas royalties by the Supreme Court in *Parker* v. *Riley*, 250 U. S. 66, 70.

For the reasons indicated, it is held that the refund is allowed.[11]

United States Court of Appeals for the Ninth Circuit

No. 13640

March 11, 1955

CLARK SQUIRE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WASHINGTON, APPELLANT

v.

HORTON CAPOEMAN AND EMMA CAPOEMAN, HIS WIFE, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before HEALY, BONE, and CHAMBERS, *Circuit Judges*.

PER CURIAM

This case has to do with the taxability as income of the proceeds of a sale of timber on trust allotted land of a tribal Indian.

Under the provisions of a treaty with the Quinaielt Indian Tribe, 12 Stat. 971, tribal lands in what is now the State of Washington were transferred to the United States. By the terms of the treaty an area was reserved therefrom and

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[11] Under the above analysis the following cases are distinguishable and have no application to the instant situation: *Jones* v. *Taunah*, 10 Cir., 186 F. 2d 445; *Choteau* v. *Burnet*, 283 U. S. 691; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418; *Cherokee Tobacco*, 11 Wall. 616; *Strom* v. *Commissioner of Internal Revenue*, 6 T. C. 621.

set apart for the exclusive use of the members of the tribe. Pursuant to the terms of the treaty and of the General Allotment Act of 1887, 24 Stat. 388, a trust patent was issued to appellee Horton Capoeman for some ninety-three acres of tribal land within the Quinaielt Reservation. The fee title to this land was and still is in the United States in trust for Capoeman (an unemancipated member of the tribe) to be conveyed to him or his heirs at the end of the trust period in fee "discharged of said trust and free of all charge or incumbrance whatsoever." 25 U. S. C. A. § 348.

In 1943, pursuant to a contract of sale entered into by the Bureau of Indian Affairs, with Capoeman's consent, standing timber on the latter's allotment was sold, cut and paid for. The timber, it is agreed, constituted the chief value of the land. A minor part of the sales price was distributed to Capoeman, the bulk of it being retained in trust for him by the United States. Capoeman and his wife, Emma, filed for that year a joint income tax return reporting long-term capital gain from the sale. Subsequently they brought this suit for refund of the tax paid, and the district court granted judgment in their favor.

The opinion of the trial judge is reported in 110 F. Supp. 924. Inasmuch as we agree with the judge's holding and in the main with the reasons given for it, no useful purpose would be served by our again plowing that field. Enough to say that in our view this attempt to tax evidences, at the least, a sorry breach of faith with these Indians. We may add that while the court below appeared to regard as distinguishable the

decision of the Tenth Circuit in the cognate case of *Jones v. Tawnah*, 186 F. 2d 445, we see no ground upon which the holding can be distinguished. Rather, we agree with the dissenting opinion of Chief Judge Phillips.

Affirmed.

(Endorsed:) Per Curiam Opinion.

Filed Mar. 11, 1955.

PAUL P. O'BRIEN,
Clerk.

[Caption omitted.]

Judgment

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered March 11, 1955.

PAUL P. O'BRIEN,
Clerk.

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